



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 5, 1998

Ms. Susan J. Barnet
Assistant District Attorney
Specialized Crime Unit
Collin County
210 S. McDonald, Suite 324
McKinney, Texas 75069

OR98-1848

Dear Ms. Barnet:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 117328.

The Collin County District Attorney (the "district attorney") received a request for all cases filed against certain named individuals. You state that the district attorney has no records relating to eight of the sixteen individuals. The Open Records Act does not require a governmental body to make available information which does not exist nor does it require a governmental body to prepare new information. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 (1992), 362 (1983). However, a governmental body must make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 (1990). You have submitted documents relating to four of the individuals. You advise that some of the requested information will be released. However, you claim that the remaining submitted information is excepted from disclosure under sections 552.003, 552.101, 552.108, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted documents may have been filed with a court. Documents filed with the court are public documents and must be released. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992).

First, you contend that some of the submitted documents are not subject to the Open Records Act pursuant to section 552.003 as they are records of the grand jury. The act does not apply to information within the actual or constructive possession of the grand jury. Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of a grand jury as the grand jury's agent, information prepared or collected by the agent is within the grand jury's constructive possession. *Id.* Information not held or maintained in this

manner is not exempt from the act's coverage and may be withheld only if one of the act's specific exceptions applies to the information. *Id.*

Information obtained pursuant to a grand jury subpoena issued in connection with this investigation is within the grand jury's constructive possession and is not subject to the act. *Id.* See also Gov't Code § 552.003. However, if the district attorney's investigation began before any information was submitted to the grand jury, and the grand jury did not formally request or direct all of the district attorney's actions in this investigation, then the information is not deemed to be in the grand jury's constructive possession. The fact that information collected or prepared by the district attorney is submitted to the grand jury, when taken alone, does not mean that the information is in the grand jury's constructive possession when the same information is also held by the district attorney. Open Records Decision No. 513 (1988). Thus, to the extent that the submitted documents were obtained at the direction of the grand jury or pursuant to a grand jury subpoena, they are not subject to the act.

Next, you assert that some of the requested information is excepted from disclosure under section 552.108. Section 552.108 provides in part:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [public disclosure] if . . . (3) it is information that: (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or (B) reflects the mental impressions or legal reasoning of an attorney representing the state.

After reviewing the submitted information, we agree that some of the documents were prepared by an attorney in the course of preparing for criminal litigation and may be withheld. However, much of the information at issue was prepared by members of the Wylie Police Department. Since you have not demonstrated that any other provision of section 552.108 is applicable to the police documents, they may not be withheld under this section.

You also assert that some of the requested information is excepted from disclosure under section 552.103. Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Additionally, section 552.103(b) provides that the state or a political subdivision is considered to be a party to litigation of a criminal nature until the defendant has exhausted all post-conviction remedies in state and federal court.

The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Therefore, the governmental body must meet both prongs of this test for information to be excepted under 552.103(a). In this instance, you have not demonstrated that litigation is pending or reasonably anticipated. Thus, the requested information may not be withheld under section 552.103.

Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. You claim that some of the submitted records are made confidential by state and federal law. Federal regulations prohibit the release of criminal history report information ("CHRI") maintained in state and local CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; see also *id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, to the extent that submitted documents contain CHRI obtained from DPS or another criminal justice agency, you must not release such information to the requestor.

We note that one of the submitted case files concerns the sexual assault of a child. Section 261.201(a) of the Family Code provides:

The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect [of a child] made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an

investigation under this chapter or in providing services as a result of an investigation.

You have not informed this office of any rules the district attorney has adopted that would permit access to this file. Accordingly, the marked case file is made confidential by section 261.201 of the Family Code and must be withheld from disclosure in its entirety under section 552.101 of the Government Code. *See* Open Records Decision No. 440 (1986) (applying former Family Code section 34.08).

Finally, the Seventy-fifth Legislature added section 552.130 to the Open Records Act which governs the release and use of information obtained from motor vehicle records. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

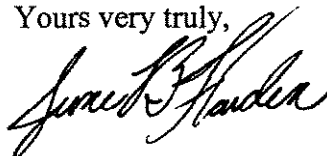
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(b) Information described by Subsection (a) may be released only if, and in the manner, authorized by Chapter 730, Transportation Code.

Therefore, you must withhold the driver's license information pursuant to section 552.130. The remaining information must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref.: ID# 117328

Enclosures: Submitted documents

cc: Mr. Mark Gilliam
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(w/o enclosures)